

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

*In re:*

OLD CARCO LLC  
f/k/a CHRYSLER LLC, et al,  
n/k/a FCA US LLC,

*Debtors.*

Case # 09-50002-smb  
New York, New York  
June 7, 2018  
10:11:40 am - 11:13:27 am

- TRANSCRIPT -

09-50002-SMB, OLD CARCO LLC AND RJM I, LLC,  
AS LIQUIDATION TRUSTEE FOR OLD CARCO LLC, CHAPTER 11  
MOTION TO REOPEN CHAPTER 11 CASE, FCA US LLC'S MOTION TO  
REOPEN THE OLD CARCO CASE FOR THE LIMITED PURPOSES OF  
(1) CONSIDERING FCA US LLC'S MOTION TO ENFORCE THE  
SALE ORDER AND (2) ADJUDICATING THE TRANSFERRED  
LITIGATION BY BRIAN D. GLUECKSTEIN;  
MOTION TO COMPEL ENFORCEMENT OF THE COURT'S  
SALE ORDER, BY BRIAN D. GLUECKSTEIN;  
MOTION TO STRIKE, FCA US LLC'S MOTION TO STRIKE  
THE AFFIDAVIT OF RETIRED JUSTICE R. BERNARD HARWOOD,  
BY BRIAN D. GLUECKSTEIN.  
BEFORE THE HONORABLE STUART M. BERNSTEIN  
UNITED STATES BANKRUPTCY JUDGE

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24 *(Proceedings recorded by electronic sound recording)*  
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1 THE COURT: Chrysler!

2 (Pause.)

3 THE COURT: Go ahead.

4 MR. GLUECKSTEIN: Good morning, Your Honor. Nice to  
5 see you. For the record, Brian Glueckstein, Sullivan &  
6 Cromwell, for FCA US LLC.

7 MR. TSUKERMAN: Good morning, Your Honor, Mark  
8 Tsukerman, from Cole Schotz. I'm here for the Plaintiffs. I'm  
9 also here with my co-counsel from the Beasley, Allen firm.

10 MS. MONPLAISIR: Stephanie Monplaisir, with the  
11 Beasley, Allen firm.

12 THE COURT: Welcome.

13 MR. MILLER: Good morning, Your Honor, Parker Miller,  
14 from Beasley, Allen.

15 THE COURT: Welcome. Go ahead.

16 MR. GLUECKSTEIN: Good morning, Your Honor. So, Your  
17 Honor, we have three motions that FCA filed that are before the  
18 Court, fully briefed and submitted. And all of which are  
19 calendared for hearing today. Subject, of course, to the  
20 Court's preferences, I would propose to address the motion to  
21 reopen, and then proceed to the motion to enforce the sale  
22 order, and to strike Mr. Harwood's affidavit.

23 THE COURT: Okay. Go ahead.

24 MR. GLUECKSTEIN: Your Honor, with respect to the  
25 motion to reopen, the motion asks this Court, as it has done in

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1 the past, in the almost three years since the final decree was  
2 entered, to reopen the Old Carco bankruptcy case to permit this  
3 Court to consider the now fully briefed motion to enforce the  
4 sale order that is pending.

5 THE COURT: It's very unusual to have a motion to  
6 reopen, and a fully briefed motion on for the same day.

7 MR. GLUECKSTEIN: Your Honor, we filed them both at  
8 the same time, because they were necessary. Both were approved.  
9 Plaintiffs have chosen to interpose an objection to the motion  
10 to reopen on a procedural point.

11 THE COURT: Mm-hm.

12 MR. GLUECKSTEIN: As I stated, all the motions are  
13 briefed. Counsel, obviously, is here.

14 THE COURT: Okay.

15 MR. GLUECKSTEIN: And we certainly think that that is  
16 a factor. And the fact that we --

17 THE COURT: Well, why don't you address the motion to  
18 reopen in two minutes.

19 MR. GLUECKSTEIN: Okay. I will address it in two  
20 minutes, Your Honor. I do think there is good cause, and we  
21 submit, there is good cause to reopen. The primary issue with  
22 respect to the motion to enforce is the question of Plaintiff's  
23 wrongful death damages that are asserted, that are punitive, we  
24 submit punitive in nature, and we think that is clear in part by  
25 the sale order.

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1           The Alabama District Court stated in its opinion that  
2     those claims directly implicate and challenge this Court's sale  
3     order, stated as much in its opinion. And so, we submit  
4     fundamentally, Your Honor, that this Court is best positioned to  
5     interpret and enforce the sale order and the MTA amendment that  
6     was approved by this Court. And we cited cases to that effect  
7     in our briefing. This Court has reached similar reasoning, and  
8     reached that conclusion in other cases, including, fairly  
9     recently, the Gawker case.

10           We do believe that it is only this Court that's  
11     positioned to provide the interpretation that will permit a  
12     uniform and consistent treatment of similarly situated claims  
13     with respect to this issue going forward. The alternative  
14     that's been suggested would be a piecemeal approach, which could  
15     lead to different --

16           THE COURT: It's going to be a piecemeal approach  
17     either way.

18           MR. GLUECKSTEIN: A piecemeal approach with respect to  
19     how this particular issue is dealt with going forward. We do  
20     believe that if this Court makes a finding with respect to the  
21     nature of the punitive damages claims, that that would be  
22     obviously guiding parties here and going forward and eliminate  
23     the inconsistent possibility of inconsistent decisions from  
24     different courts, which courts often look to in considering  
25     whether the bankruptcy court should consider these issues in the

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1 first instance.

2 I also do believe, and we submit, Your Honor, that  
3 reopening the case here to consider the motion to enforce will  
4 conserve resources and be most efficient. This is not a  
5 question, Your Honor, of what is the best forum to litigate the  
6 merits of the underlying claims. The threshold question to be  
7 answered, as Your Honor is well aware, is whether the  
8 Plaintiff's punitive damages claims can proceed, or are barred  
9 by the sale order to proceed in any forum. Certainly, Judge  
10 Garrity noted in the Attardi case recently, the need to answer  
11 that threshold question weighs in favor of reopening. And so,  
12 we would submit, Your Honor, that this Court has retained  
13 jurisdiction to do just this. It's done it in other cases.  
14 Guidance here at the outside of the case before we proceed in  
15 Alabama with discovery and other issues that would further  
16 develop the record, we believe is critical.

17 And finally, Your Honor, we would submit that clearly  
18 Plaintiffs had indicated an interest in moving forward with  
19 discovery in the underlying action. We think a decision as to  
20 whether punitive damages of these conduct-based punitive claims  
21 can go forward is critical to narrowing those issues. And  
22 absent a prompt decision potentially could prejudice FCA with  
23 respect to those matters.

24 THE COURT: What about the failure to warn claim?  
25 Maybe we're getting into the merits.

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1 MR. GLUECKSTEIN: Your Honor, the question that has  
2 been raised by the Plaintiffs with respect to the failure to  
3 warn claim is that the Alabama court decided that there was not  
4 a bankruptcy issue. We would respectfully disagree on that, as  
5 to whether that is binding on this Court. I think the issue --

6 THE COURT: You know, that's one of the questions I  
7 had, and certainly, the Alabama court considered the issue. It  
8 didn't really rule on the issue, it just said it was less  
9 convinced.

10 MR. GLUECKSTEIN: Correct.

11 THE COURT: It had jurisdiction, although I have no  
12 problem concluding I have jurisdiction to at least decide the  
13 threshold issue; not to try the underlying merits in the case.  
14 But the court also said, I think it was -- who's the other  
15 Plaintiff?

16 MR. GLUECKSTEIN: Mr. Overton?

17 THE COURT: No.

18 MR. GLUECKSTEIN: Graham?

19 THE COURT: Mr. Graham also said that his claims  
20 implicated; won't say they stated a cause of action, but  
21 implicated post-sale conduct, and therefore, they didn't  
22 implicate the sale order. So, what do I do with that?

23 MR. GLUECKSTEIN: So, Your Honor, first, it was  
24 asserted in the briefing that this was somehow either a law of  
25 the case, or this could be interpreted as a *res judicata* type

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1 defense. I don't think that's the issue.

2 THE COURT: Well, nobody's briefed *res judicata* under  
3 Alabama law.

4 MR. GLUECKSTEIN: So, I would submit, Your Honor, that  
5 the Court has the ability under its jurisdiction, always has the  
6 jurisdiction, as the Court knows, under Travelers to consider  
7 its prior orders. We would submit that the issue is fairly  
8 narrow with respect to those claims, and happy to address the  
9 issues now or with respect to the merits. But I don't think  
10 that the comments from the court, and agree with your  
11 characterization of them, preclude this Court from exercising  
12 jurisdiction with respect to those claims. And regarding --

13 THE COURT: I mean basically, I could consider the  
14 same issue, is what you're saying.

15 MR. GLUECKSTEIN: I think the case law is clear on  
16 that.

17 THE COURT: To the extent that the Alabama judge  
18 considered it at all.

19 MR. GLUECKSTEIN: Yes, Your Honor.

20 THE COURT: And the Alabama judge recognized that in  
21 the decision, which I --

22 MR. GLUECKSTEIN: Correct. And that deals with the  
23 personal injury claims of Plaintiff Graham. Certainly, the  
24 Alabama court concluded that this Court has jurisdiction with  
25 respect to the wrongful death claims. And that alone would be



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1 reason in our view to reopen the case. But I think there is  
2 nothing that would prohibit this Court from addressing both of  
3 the issues, which are fully briefed. And we would submit that  
4 this Court should exercise its jurisdiction to do to.

5 THE COURT: All right. Let me hear from Mr.  
6 Tsukerman, if he's the one, on the motion to reopen.

7 MR. TSUKERMAN: Thank you, Your Honor. So, there are  
8 two Plaintiffs here. There's Overton claims and Graham claims.  
9 And the Alabama District Court's decision dealt with them  
10 differently, because they're somewhat in different positions.  
11 So, let me start first with Graham's claims, Your Honor. First  
12 of all, obviously, Judge, you read the Alabama District Court  
13 decision and it somewhat speaks for itself, but we think that  
14 decision went further. We think the judge clearly concluded  
15 that Graham's claims didn't implicate the sale order and didn't  
16 create federal jurisdiction.

17 THE COURT: Well, let's suppose he did, and maybe this  
18 is, again, getting to the merits, which is where I think this  
19 thing is going. But supposing he reached that conclusion, does  
20 that prevent me from considering the same issue and reaching the  
21 opposite conclusion? And if so, under what doctrine of  
22 preclusion?

23 MR. TSUKERMAN: So, we think the issue is, you have  
24 another federal court that's considered the complaint, reviewed  
25 and analyzed the claims, and ruled that it doesn't implicate the

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1 sale order. And the question is what deference to afford that  
2 conclusion and that decision. And we think under principles of  
3 law of the case and under the policy behind Section 1452(a), the  
4 bankruptcy removal statute, you shouldn't reconsider that issue  
5 and essentially vacate that order, which is FCA is asking you to  
6 do. The law of the case, it's a much broader doctrine.

7 THE COURT: It's a discretionary doctrine.

8 MR. TSUKERMAN: It's a discretionary doctrine. It's  
9 not as rigid as FCA makes it out to be.

10 THE COURT: And I'm told it only applies in the same  
11 court.

12 MR. TSUKERMAN: We disagree, Your Honor.

13 THE COURT: Okay. I'm not talking about collateral  
14 estoppel. What case says that if court-A decides an issue,  
15 court-B in a different court, under principles of law of the  
16 case, should follow that result?

17 MR. TSUKERMAN: There have been cases where courts  
18 have applied law of case to coordinate federal courts on issues  
19 of jurisdiction. And I would cite, for example, the Supreme  
20 Court's decision, 486 U.S. 800.

21 THE COURT: I'm sorry, what's the name of that case?

22 MR. TSUKERMAN: It's Christianson v. Colt Industries  
23 Operating Corp., 486 U.S. 800 (1988). And there were also  
24 similar issues discussed in a Second Circuit decision in PCH  
25 Associates Liona Corporation Inc, 949 F.2d 585. In that case,

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1 the Second Circuit noted that different law suits by the same  
2 parties could be precluded under law of the case.

3 THE COURT: Okay.

4 MR. TSUKERMAN: The point is, once parties litigate  
5 and battle out an issue, and it's been ruled on, they shouldn't  
6 have to relitigate it, which is exactly what FCA is trying to do  
7 here. And also, under Section 1452(b), the bankruptcy removal  
8 statute, which the remand order was issued under, those orders  
9 are nonreviewable on appeal. They're meant to be final.

10 THE COURT: Well, that's the remand order though.

11 MR. TSUKERMAN: But that's the order that was entered  
12 on --

13 THE COURT: But I'm not reviewing the decision to  
14 remand. I know that Chrysler says it was a mistake whatever the  
15 Alabama judge did, Judge Proctor, but I'm not going to review  
16 his decision. The question is whether I can consider what is  
17 essentially an issue he considered.

18 MR. TSUKERMAN: That's right. But the issue he  
19 decided, he concluded that the case should be remanded because  
20 the court lacked jurisdiction over Graham's claims. One other  
21 point. I did note that the issue wasn't briefed.

22 THE COURT: Well -- okay, go ahead. I don't know if  
23 you can separate the jurisdictional question from the question  
24 I'm asking. Obviously, if he had ruled, I would have  
25 jurisdiction to interpret whether or not Overton's claim or

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1 Graham's claim was barred by the sale order. Would you agree  
2 with that?

3 MR. TSUKERMAN: If he had not ruled, Your Honor, you  
4 exercised your jurisdiction as the bankruptcy gatekeeper with  
5 Dearden complaints, other complaints, and presumably, you would  
6 be able to --

7 THE COURT: So, I would have jurisdiction. So, you're  
8 saying that his decision stripped me of subject-matter  
9 jurisdiction?

10 MR. TSUKERMAN: I'm saying it's a question of  
11 discretion.

12 THE COURT: Okay. Fair enough. Look, let me save  
13 some time on this one. I'm going to grant the motion to reopen.  
14 Without ruling on whether or not I should or must defer to the  
15 decision of Judge Proctor, I think that's part of the merits of  
16 the underlying motion. So, by reopening the case, I'm not  
17 saying, gee, I'm just going to ignore what Judge Proctor did,  
18 and consider the same issue. I may in the end, but I think it  
19 goes to the merits about whether or not it's appropriate for me  
20 to consider it. But I have to reopen the case in order to  
21 consider that issue to consider the punitive damage issue, which  
22 is really the main issue in this case. So, I'll grant the  
23 motion to reopen.

24 MR. TSUKERMAN: And, Your Honor, just to be clear,  
25 would that apply to Overton's claims as well? Because that's

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1 kind of a separate issue, and I think the Overton also has an  
2 abstention component that we made in our opposition, --

3 THE COURT: Well, I'm not --

4 MR. TSUKERMAN: -- which has different --

5 THE COURT: I know that argument. I'm not sure that I  
6 would abstain on an issue of bankruptcy law.

7 MR. TSUKERMAN: We don't there is really an issue of  
8 bankruptcy law.

9 THE COURT: Well, I disagree with you on that. So,  
10 I'll grant the motion to reopen. And let me hear the merits.  
11 You can submit a separate order on that.

12 MR. GLUECKSTEIN: We will, Your Honor.

13 THE COURT: And I'll also hear the motion to strike  
14 the affidavit. You want to do that first since that's a  
15 discrete issue.

16 MR. GLUECKSTEIN: Happy to do that first, Your Honor.  
17 It is a discrete issue, obviously, related to the motion. We've  
18 briefed the motion to strike. I'm not going to repeat what's in  
19 the motion. But really, there's two points we think, Your  
20 Honor. The first really does go to the merits of the underlying  
21 motion, which goes to the relevance. And there's a fundamental  
22 disagreement about whether the question here is, a question of  
23 bankruptcy law, or there's a question of interpretation  
24 required.

25 THE COURT: I agree with you, I wouldn't take an

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1 expert opinion on the law. That's what we're supposed to do  
2 when you decide state law questions all the time. But why not  
3 just accept it as legal argument? I checked. They're under the  
4 briefing limit for pages. Why not just treat it as a brief?  
5 You dealt with it; they dealt with it in their opposition; and  
6 you dealt with it in your reply.

7 MR. GLUECKSTEIN: Your Honor, I think --

8 THE COURT: And to the extent that Judge Horowitz says  
9 stuff, but there's no backup to it, or he gives his opinion, I  
10 would treat that the same as any lawyer putting it in a brief.

11 MR. GLUECKSTEIN: Certainly, I think, Your Honor, if  
12 that's the Court's point of view, and makes that clear on the  
13 record, we don't have objection. The problem we have with the  
14 affidavit is it's cited to in their reply brief. They are  
15 offering him as an expert as admissible evidence under Federal  
16 Rules of Evidence, Rule 702. And then they rely on the  
17 affidavit as authority and citations in their briefing.

18 THE COURT: I understand.

19 MR. GLUECKSTEIN: So, that's the issue. If Your Honor  
20 wants to just take it as part of the briefing record, and  
21 nothing more, certainly the Court has discretion to do.

22 THE COURT: Mr. Tsukerman? I'm sorry.

23 MS. MONPLAISIR: Your Honor, I will be addressing the  
24 motion to strike. Your Honor, this Court certainly has  
25 discretion to consider any source it deems helpful in reaching

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1 its opinion.

2 THE COURT: But you're offering -- and I can consider  
3 it. And I would consider it as legal argument, essentially, as  
4 I said. But I wouldn't normally take an expert affidavit on  
5 U.S. law or states law.

6 MS. MONPLAISIR: Well, Your Honor, we believe the  
7 Second Circuit allows this type of affidavit in evidence. It's  
8 helpful to the judge. Well, first of all, Judge Horowitz is  
9 well qualified, and they really having addressed that.

10 THE COURT: I don't mean to impugn or question Judge  
11 Horowitz's qualifications. My question is, you know, he told me  
12 that's what the law is. And I have lawyers here telling me  
13 laws. Why should I treat it anything more than legal argument  
14 on what Alabama law is? This is what he thinks the law is,  
15 right?

16 MS. MONPLAISIR: Well, Your Honor, his affidavit does  
17 not cross the line into inadmissible legal conclusions like the  
18 cases that have been cited.

19 THE COURT: What does it add to the case?

20 MS. MONPLAISIR: He tells this Court how punitive  
21 damages, how wrongful death punitive damages are treated  
22 differently in practice in the state. And you can't gather that  
23 just from looking at the statute. You can't gather that just  
24 from looking at case law. So, that's why we wanted to submit to  
25 the Court a practitioner's and a jurist's opinion on how they're

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1 actually treated differently.

2 THE COURT: Where is his experience described in  
3 trying punitive damage cases in his affidavit?

4 MS. MONPLAISIR: Your Honor, in his affidavit, he does  
5 not expressly --

6 THE COURT: Well, then how can I conclude that he's an  
7 expert in the trial of punitive damage cases if you're not  
8 telling me he ever tried a punitive damage case?

9 MS. MONPLAISIR: Your Honor, in our opposition to  
10 FCA's motion to strike, we list the number of cases that Judge  
11 Horowitz has presided over while he was on the Alabama Supreme  
12 Court, all involving the wrongful death statute or wrongful  
13 death damages. He is also on the pattern jury instructions that  
14 instruct juries on what these damages mean, and how they're  
15 applied in practice. So, under Rule 702, he has extensive  
16 experience and knowledge on how they're treated differently.

17 THE COURT: Look, I will accept his affidavit or  
18 declaration, essentially, as legal argument. As I said, you're  
19 under the page limit and you've addressed it in your opposition,  
20 and you've addressed it in your reply. I'll treat it like a  
21 lawyer's argument.

22 MS. MONPLAISIR: Thank you, Your Honor.

23 MR. TSUKERMAN: That's really fine, Your Honor. Our  
24 issue, as I said, was the evidentiary part.

25 THE COURT: Yes, I'm not going to accept it as an



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1 expert witness. Okay. You can submit an order on that one  
2 also.

3 MR. GLUECKSTEIN: Okay. Yes, Your Honor. So, with  
4 that, Your Honor, that brings us to the two merits, the motion  
5 to enforce the sale order. And there are two components. The  
6 primary component is with respect to Plaintiff's Overton's  
7 wrongful death claims, and the punitive damages claim that's  
8 asserted under Alabama Law. And, Your Honor, we submit that  
9 there are two pieces of relevant information to the question  
10 that's presented by these claims.

11 First, would the MTA preclude punitive damages? And  
12 second, are wrongful death damages that are being sought under  
13 the cause of action in the complaint punitive? And we submit,  
14 Your Honor, the answer to both is plainly yes. As such, FCA  
15 submits, the Court can readily determine, this Court can readily  
16 determine that Plaintiff's wrongful death claims are barred by  
17 the sale order.

18 As to the first issue, the sale order and MTA provide  
19 that Section 2.08 is the sole source of FCA's assumption of Old  
20 Chrysler liabilities. That's an issue that's been discussed  
21 with Your Honor in many contexts over the years. By Amendment  
22 4, which voluntarily amended the MTA five months after closing,  
23 FCA assumed certain additional product liability claims with  
24 respect to post-closing accidents involving Old Chrysler  
25 vehicles. Consistent with FCA only agreeing to assume

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1 liabilities for defects in the vehicle itself, the assumption of  
2 liability was qualified with the requirement that a complaint  
3 "not include a claim for exemplary or punitive damages."

4 That language is clear and unambiguous. Plaintiffs,  
5 in their opposition, suggest the fact that the fact that  
6 punitive damages is undefined in the MTA, somehow creates an  
7 ambiguity. And we submit, Your Honor, that's not the law.

8 THE COURT: Is there any evidence, extrinsic evidence,  
9 that you're aware of, that would assist me in the interpretation  
10 of that phrase, assuming it is ambiguous?

11 MR. GLUECKSTEIN: I expected you were going to ask  
12 that question, Your Honor.

13 THE COURT: It's always the question I ask.

14 MR. GLUECKSTEIN: I don't believe there is.

15 THE COURT: Okay.

16 MR. GLUECKSTEIN: I think this is a question, of  
17 punitive damages, means punitive damages. And there's a  
18 discussion in the briefing that perhaps we're suggesting  
19 something otherwise, and we address that in our reply briefing.  
20 I think we agree that there is in fact a concept of punitive  
21 damages that's well understood in the profession and to the  
22 Court, and that the hallmark of punitive damages, if you look at  
23 how punitive damages are defined in virtually any context, is  
24 that they are intended to punish actor. And the existence of  
25 condition 'D' in 2.08(h), reveals that the MTA intends to bar

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1 all punitive damages. There's no suggestion that there's a  
2 qualification to particular types of punitive damages or  
3 anything else. It simply states punitive damages. And in fact,  
4 this Court has reinforced that fact in the distinction between  
5 compensatory and punitive damages in other contexts and issues  
6 that have arisen under the sale order. And so, we thank Your  
7 Honor and submit that Section 2.08(h), as amended is clear.  
8 Punitive damages are barred. If the Plaintiff asserts a claim  
9 that contains punitive damages, that claim cannot proceed.

10 The second part of the analysis, we submit, is the  
11 nature of the nature of the damages that are being asserted in  
12 the complaint. And that question, which has been the subject of  
13 many pages of briefing now before Your Honor, we submit has been  
14 answered definitively with a resounding yes. The Alabama  
15 Supreme Court has been presenting virtually every permutation of  
16 why damages under the wrongful death statute are not punitive.  
17 And the case law reveals that it has rejected them. This is  
18 outlined in the briefing. As we detail in our papers, dating  
19 back 150 years, all the way up to the present, the Alabama  
20 Supreme Court has time and again that wrongful death damages are  
21 not compensation; that they are intended to impose civil  
22 punishment; that they are punitive; that they are the only  
23 damages that are available under Alabama Law. And in the Tillis  
24 Trucking Company case that's cited in our briefing, the Alabama  
25 Supreme Court actually states that it's understood the

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1 legislative intent to be that the jury is "to award punitive or  
2 exemplary damages." That's the same phrase that exists in  
3 Section 2.08(h) of the MTA. And so certainly, this Court can  
4 review that controlling precedent and determine for itself  
5 whether our reading is correct. If so, the wrongful death  
6 claims are barred by the MTA.

7 And, Your Honor, this issue is --

8 THE COURT: Well, one of the arguments they make, I  
9 guess, is that the types of damages that are recoverable in  
10 Alabama are not the traditional punitive damages. In other  
11 words, you don't have to show willful and wanton, or socially  
12 reprehensive conduct and motives in order to get them. What's  
13 your response to that?

14 MR. GLUECKSTEIN: Well, two responses, Your Honor.  
15 First, I think, aside from Mr. Horowitz' argument in the  
16 briefing that's relied on, if we actually look at the cases that  
17 are cited in our briefing, I think this issue has been  
18 addressed. Time and again, the Alabama Supreme Court has said,  
19 these damages are interpreted to be punitive. We're not going  
20 to twist this to be compensatory; they're punitive. There's no  
21 suggestion that punitive means something different in this  
22 context. And much of the focus of their briefing is on this  
23 question of the standard and the question that perhaps because  
24 there's availability or potential availability for wrongful  
25 death damages in Alabama on a negligence standard, that that

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1 somehow differentiates this.

2 THE COURT: Well, that makes it worse, not better.

3 MR. GLUECKSTEIN: We submit, Your Honor, that that  
4 certainly makes it worse. And it's a false distinction with  
5 respect to willfulness and the like. First of all, there is a  
6 count for wantonness in the complaint. And so, the suggestion  
7 that the Plaintiff is not pursuing that sort of wrongful conduct  
8 type theory is not correct under the complaint.

9 THE COURT: Could the Plaintiff solve all of this by  
10 crafting a jury charge that essentially looks like a  
11 compensatory jury charge saying, you shouldn't consider  
12 willfulness of the conduct or malice of the conduct, or anything  
13 like that? And compensate based on pain and suffering, loss  
14 wages, the whole thing.

15 MR. GLUECKSTEIN: I think the case law is clear. And  
16 this is talked about in the King case that we cite in the  
17 Alabama Supreme Court, where they're not going to twist this to  
18 mean compensatory when it means punitive. And so, the theory  
19 that's been expounded numerous times in these decisions goes to  
20 the need to treat this punitively.

21 THE COURT: Have you seen, or are you aware of any  
22 cases under Section 726(a)(4) that have subordinated wrongful  
23 death punitive damage awards issued in Alabama? I looked, I  
24 didn't see anything, but I was curious about that.

25 MR. GLUECKSTEIN: I have not, Your Honor.

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1 THE COURT: Okay.

2 MR. GLUECKSTEIN: But admittedly, I haven't done a  
3 deep dive on that, but I have not. But I think the question  
4 that you're suggesting is, is there a way around this either by  
5 pleading, jury charge, etcetera, and we think that the Alabama  
6 Supreme Court is clear on this. It doesn't take former Justice  
7 Horowitz's advocacy as to intent behind this. Because what Your  
8 Honor is to do is look at the case law as controlling case law,  
9 we submit, and is going to interpreter this. And we think that  
10 that is an important fact.

11 The Plaintiffs have suggested, and I'm sure we're  
12 going to hear that there is somehow some undecided or question  
13 of Alabama Law to be presented by this court, and we just  
14 respectfully disagree. The motion does not ask, nor does it  
15 require this Court to make a determination whether wrongful  
16 death damages are punitive under Alabama Law. We think that the  
17 case law is clear on that. And if Your Honor agrees with us, we  
18 think this issue is very straightforward, given the language  
19 that exists in 2.08(h) of the MTA.

20 One other point on the negligence point, Your Honor,  
21 and you alluded to it, we do think the fact that wrongful death  
22 damages can be asserted in Alabama potentially on a negligence  
23 standard, we think runs afoul of other issues in the MTA. It  
24 goes to the fundamental point that punitive damages, going back  
25 to this conduct argument of whether punitive damages are

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1 intended to have FCA defend Old Chrysler conduct. Defending a  
2 negligence theory for punitive damages has us back in that  
3 world. And I think as Your Honor suggested, we submit, makes  
4 the situation worse. Because now we're not facing compensatory  
5 damages, we're facing uncapped, unbounded punitive damages under  
6 Alabama law under potentially a negligence fate. And so, we  
7 would submit, Your Honor, that with respect to this question of  
8 whether or not the damages are in fact punitive, that there's  
9 clear controlling case law that Your Honor can review and apply  
10 to the clear language of 2.08(h).

11 Plaintiffs also suggest in their briefing that somehow  
12 such an application would somehow violate a public policy,  
13 either in Alabama or elsewhere. We address this in the  
14 briefing. We disagree. They have not cited anything that  
15 actually stands for the sweeping proposition that they claim.  
16 And the reality is that FCA disclaimed punitive damages. The  
17 fact that the Alabama state legislature has chosen not to  
18 provide compensatory damages to be available on a wrongful death  
19 claim, we submit, does not give cause for this Court to fit the  
20 claim that is otherwise available under state law into this sale  
21 order.

22 The language is clear. That's not a new issue. We  
23 cite some cases to that effect in our reply papers. This issue  
24 came up with respect to Section 1983 cases once the nature of  
25 those claims were determined. And so, there's nothing here that

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1 suggests that FCA coming to this Court and asking the plain  
2 language of the sale order to be enforced if the result is that  
3 under Alabama Law they can't maintain a wrongful death action  
4 violates any type of public policy.

5 THE COURT: Can I ask you about the Graham claim and  
6 this failure to warn claim?

7 MR. GLUECKSTEIN: Yes. I was going to go right there,  
8 Your Honor. Yes.

9 THE COURT: I've said, Judge Glenn has said, and Judge  
10 Furman recently affirmed what Judge Glenn said. You know you're  
11 a gatekeeper. If it relies on post-sale conduct, you just send  
12 it out, and if you think it fails to state a claim, that's for  
13 the trial court to decide.

14 MR. GLUECKSTEIN: So, Your Honor, on the Graham claim  
15 and I understand state of the law, both with this Court --

16 THE COURT: And I'm going to assume, for the purposes  
17 of my question, that from point of view, the allegations of  
18 imputation that underlie the failure to warn claim are wholly  
19 insufficient. But isn't it still the determination that should  
20 be made by the state court in Alabama?

21 MR. GLUECKSTEIN: Your Honor?

22 THE COURT: You make a motion to dismiss. That's the  
23 way you deal with it.

24 MR. GLUECKSTEIN: Your Honor, we submit no. And we  
25 understand the Court's reasoning both in Dearden and Judge



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1 Glenn's opinions. And I actually think that Judge Glenn's  
2 opinion, which was reaffirmed in his most recent opinion last  
3 most in one of the GM cases, --

4 THE COURT: Well, Judge Furman affirmed a lot of his  
5 decisions, and vacated certain of them.

6 MR. GLUECKSTEIN: But the concept, Your Honor, there's  
7 still this gatekeeper function.

8 THE COURT: Right.

9 THE COURT: We would submit, it certainly can't be  
10 that a Plaintiff can just allege post-sale conduct, and say it's  
11 post-sale conduct, and therefore, absolve itself of any review  
12 by this Court.

13 THE COURT: But then can't you just argue that the  
14 allegation is insufficient? After all, if it's sufficient, and  
15 they can prove, for example, that under Alabama Law, there's a  
16 duty to warn if you know of a danger, let's say. And you knew,  
17 which I guess is kind of what they're alleging. Why should the  
18 sale order exonerate you for that?

19 MR. GLUECKSTEIN: It wouldn't if that claim is  
20 actually pled. And I understand that the Court is not going to  
21 decide the motion to dismiss. We would submit, under this body  
22 of case law, there's still a threshold question that has to be  
23 answered, which is their complaint as actually drafted, could it  
24 plausibly state any claim, putting aside the state of the law.  
25 Or is it just simply saying, post-sale conduct? And I think

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1 Judge Glenn addresses this. He talks about it in the decisions.

2 For example, Your Honor, in the most recent decision  
3 that came out last month that I only have a Westlaw cite to,  
4 2018 WL 2085616. It was a May --

5 THE COURT: What's the Westlaw cite? I have the 2018.

6 MR. GLUECKSTEIN: 2085616. Judge Glenn, referring to  
7 some of his earlier decisions, again reaffirmed that only truly  
8 independent claims, based solely on post-sale conduct, can pass  
9 through the gate as independent claims. And so, what we would  
10 submit, Your Honor, is there still a role for this Court to look  
11 at the complaint and determine whether the complaint, as pled  
12 actually says this is a claim against FCA? That that minimum  
13 step has to be taken. That it can't be jumbled together. It  
14 can't be based on allegations against all Defendants that  
15 include Old Chrysler --

16 THE COURT: Well --

17 MR. GLUECKSTEIN: -- and FCA, which is what's  
18 suggested.

19 THE COURT: I understand the complaint to say that FCA  
20 absorbed Old Chrysler and through some imputation had knowledge,  
21 and failed to warn, etcetera. Failed to recall; failed to warn.  
22 This isn't the kind of case, like I think it was Dearden where  
23 the old entity and the new entity were merged together, and it  
24 was difficult to determine which was the wrongdoer in the  
25 allegations.

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1 MR. GLUECKSTEIN: Agreed to the extent, Your Honor,  
2 that in the prayer for relief here, there is a specific mention  
3 of claims against FCA. But certainly, in the allegations, the  
4 substantive allegations of the complaint, they talk about  
5 Chrysler jointly as defined. They also talk about all products  
6 liability defendants, which are Old Chrysler, FCA and the other  
7 defendants in the case. And so, we would certainly submit, Your  
8 Honor, we don't think, if the complaint is looked at on a whole,  
9 that this actually does what Judge Glenn and now Judge Furman  
10 have said need to happen, which is set forth a claim solely  
11 against FCA. If Your Honor determines that that is in fact the  
12 case, we agree that the case law in this circuit is now clear  
13 that the merits of an underlying motion to dismiss are going to  
14 be decided back in Alabama.

15 But the concern, Your Honor, is that this creeps in a  
16 direction where we can simply say, we have a claim against FCA  
17 based on post-sale conduct, and nothing else that's specific to  
18 FCA, and that that's enough to get through the bankruptcy case.

19 THE COURT: I'm looking at Paragraph 56 of the  
20 complaint, skipping the first sentence. "The defective  
21 condition of the subject vehicle was known by Chrysler and/or  
22 former Chrysler companies absorbed by FCA, and that knowledge  
23 transferred to FCA. And despite FCA's knowledge, it failed to  
24 warn, recall," etcetera. So, at least that allegation is  
25 telling you what the theory is. The allegation may be

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1 insufficient because there's nothing in the complaint that says  
2 that New Chrysler has any documents.

3 MR. GLUECKSTEIN: Correct.

4 THE COURT: There's nothing in the complaint that says  
5 that employees from Old Chrysler went to New Chrysler, and their  
6 knowledge would be imputed to New Chrysler. I understand that.  
7 That's really an argument that the allegations are insufficient,  
8 not that they don't implication post-sale conduct. And you  
9 know, this comes up a lot in these cases. And I understand the  
10 problems you're having with the failure to warn claims. But if  
11 they're true failure to warn claims that arose post sale, it  
12 seems to me that they get past the gate.

13 MR. GLUECKSTEIN: I understand the Court's comments  
14 there. I think part of the issue though is, and it's a  
15 question, obviously, for the Court that we're presenting here in  
16 this motion, is the allegation that you just read in Paragraph  
17 56, sufficient to state a claim against FCA if you get through  
18 the bankruptcy gate? Because if you look at the other  
19 substantive allegations, all the Court needs to do is look at  
20 the preceding sentence in Paragraph 56, where it says the  
21 defective condition was known by the product liability  
22 defendants, which includes everybody, including Old Chrysler and  
23 FCA.

24 THE COURT: By the way, there's the same allegation in  
25 Paragraph 47. But there is an allegation in there. You know

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1 what their theory of the case is. I agree with you there aren't  
2 really any facts in here that support the allegation because New  
3 Chrysler didn't absorb Old Chrysler.

4 MR. GLUECKSTEIN: Correct. And, of course, we think  
5 that's fundamental point that is alleged. It's understood that  
6 there's case law that suggests, they need to show facts. We  
7 believe it's very clear, they'll need to show individualized  
8 facts that individual employees --

9 THE COURT: I don't know what the pleading rules are  
10 in Alabama, so I can't say.

11 MR. GLUECKSTEIN: But regardless, we think there is a  
12 question again for this Court as to whether or not this, as  
13 alleged, is really just a backdoor successor liability claim.  
14 There's language in here about absorbing companies and people  
15 that we believe is inconsistent with the sale order. And then  
16 you've got this question of whether these singular allegations  
17 are enough to pass through the gage to allow this to proceed to  
18 the motion to dismiss stage. We would submit that this  
19 complaint does not, but we understand the issue with respect to  
20 where that line is drawn. We suggest that there is no role for  
21 the Court on these particular claims.

22 THE COURT: Thank you.

23 MR. GLUECKSTEIN: Thanks, Your Honor.

24 MR. MILLER: Good morning, Your Honor, Parker Miller  
25 for Overton and Graham. I'm going to cover the Graham related

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1 allegations first, and then we can turn our attention back to  
2 punitive damages if that's okay with Your Honor?

3 THE COURT: That's fine.

4 MR. MILLER: Your Honor, you know, obviously, I had an  
5 outline I wanted to cover, but it's probably best to just tick  
6 off from his arguments and go from there. Your Honor, I would  
7 respectfully submit, even if you look in Paragraph 47, the  
8 complaint actually says, not just that knowledge was transferred  
9 or absorbed by FCA from Old Chrysler, but it also says in a  
10 preceding paragraph that it was known to the Defendants. That  
11 the defects that are alleged by the Plaintiffs were known to the  
12 Defendants. So, there is a separate allegation that they  
13 possessed knowledge as to the defects that we alleged.

14 THE COURT: You know one of the problems I have with  
15 your duty to warn claim is the complaint alleges that the  
16 proximate cause of the injuries, the Graham injuries, was the  
17 defective condition of the vehicle. If that's true, how can the  
18 proximate cause of the injury be the failure to warn?

19 MR. MILLER: Your Honor, I think that raises a really  
20 good point. And you actually made a statement just a second ago  
21 when Mr. Glueckstein was talking. You said, well, I don't know  
22 what the Alabama pleading standards were. And so, what I'd like  
23 to do is enlighten the Court on what those standards are to kind  
24 of give you an idea of why we pled the way we did.

25 Importantly, Your Honor, Alabama is a notice pleading

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1 state. And what that means is that the plaintiff need only make  
2 generalized statements to put the defendants on notice as to  
3 what the claims are against it. Importantly, and this is from a  
4 fairly recent decision from the Alabama Court of Civil Appeals.  
5 Cert. was denied, so it is the law in Alabama. It's McKelvin v.  
6 Smith, 85 So. 3d 386. And what the court does is it walks  
7 through basically the pleading standard in Alabama at the time.  
8 It says, number one, "pleading technicalities are now largely  
9 avoided". And the reason why they're avoided is because aside  
10 from placing the defendants on notice as to what the claims are  
11 against it, discovery fills in the factual allegations.

12 THE COURT: I understand that, but I assume proximate  
13 cause is an element of a tort claim in Alabama?

14 MR. MILLER: Yes, Your Honor. That's correct.

15 THE COURT: And what I'm saying is, if your complaint  
16 alleges that the proximate cause is the defective condition, how  
17 can the proximate cause be the failure to warn? Which would be  
18 the only basis to circumvent the sale order.

19 MR. MILLER: Well, and that also gets to the other  
20 interesting aspect of Alabama's pleading laws, which is,  
21 plaintiffs can plead in the alternative. So, if a plaintiff  
22 pleads that the defective e condition was the proximate cause of  
23 the injuries, they can also plead the inconsistent statement  
24 that the cause of the injuries was actually the failure to warn.  
25 In fact, --

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1 THE COURT: Do you plead that there?

2 MR. MILLER: Yes, Your Honor, I believe we pled, and  
3 Paragraph 47 is an example under negligence, that --

4 THE COURT: And you say is a proximate result in 48.  
5 Okay.

6 MR. MILLER: That's correct. And Your Honor I think  
7 it's important to note, we've been talking about Graham a lot,  
8 but the complaint does not differentiate between Graham and  
9 Overton. In fact, it is very possible that the facts will show  
10 that it's the post-sale wrongful conduct of FCA that was the  
11 cause of Overton's death. And obviously, if that's the case, as  
12 the case precedent shows, it --

13 THE COURT: They're a little situation because Graham  
14 can certainly sue for compensatory damages. Nobody is disputing  
15 that, whether it's pre-sale or post-sale conduct, This just  
16 relates to his failure to warn claim and the punitive damages  
17 claim.

18 MR. MILLER: Yes, Your Honor.

19 THE COURT: You know I had these gentlemen in another  
20 case, and the failure to warn doesn't really add anything to the  
21 underlying case because of the sale order. You know obviously  
22 the injuries, on your theory, were caused by the defective  
23 condition of the car. If it wasn't defective, there'd be no  
24 failure to warn.

25 MR. MILLER: Well, obviously, if it's not defective,



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1 then they would have no reason to warn. But it's important to  
2 note that a failure to warn gives rise to an independent duty on  
3 behalf of FCA.

4 THE COURT: Yeah, I understand. And there's always  
5 the question of, is there a failure to warn state law claim, and  
6 what are the elements of that claim. But that's not something  
7 that we deal with.

8 MR. MILLER: And that's a good point. I mean these  
9 are merits, determinations made by the trial court as you've  
10 noted. It's important to note too that in Alabama, you can  
11 actually have concurring causes. So, it is possible that there  
12 can be more than one proximate cause to an injury. And again --

13 THE COURT: How would you decide which is post-sale,  
14 which is pre-sale, and how would you rack up punitive damages?

15 MR. MILLER: Well, I think in that situation,  
16 normally, after the facts have been discovered, and obviously,  
17 FCA would file its motions to dismiss, and knock out certain  
18 parts of the Plaintiff's complaint. That's certainly a  
19 possibility. And you even mentioned your instructions to the  
20 extent necessary. So, there are a number of ways that that can  
21 be carved up. But you know it kind of gets to a difficulty that  
22 Your Honor faces in this situation. Here we are, a complaint  
23 has just been filed. FCA immediately moves it to federal court.  
24 Federal court abstains; sends it back to state court. Then we  
25 go to the bankruptcy court. No discovery has even taken place.

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1 And we believe that under Alabama's pleading standards, we have  
2 pled this complaint correctly. But obviously, as we go forward,  
3 and as we learn more in discovery, then it's a good possibility  
4 that those allegations could change, as they do in any other  
5 case in litigation.

6 THE COURT: Okay. Thank you.

7 MS. MONPLAISIR: Your Honor, I want to address your  
8 questions as far as Alabama's wrongful death damages. And first  
9 I want to reframe the issues for the Court. Because any time  
10 the Court is asked to enforce a sale order, it's really making a  
11 determination on contract interpretation. So, there are three  
12 issues for the Court to decide to interpret this contract.

13 Number one is, are the terms exemplary? Are punitive  
14 damages ambiguous?

15 THE COURT: If they are, are you aware of any  
16 extrinsic evidence that I could review in order to interpret  
17 that supposedly ambiguous phrase?

18 MS. MONPLAISIR: Yes, Your Honor. In fact, FCA and  
19 the Plaintiffs both cited to Black's Law Dictionary.

20 THE COURT: Okay. But that's not extrinsic. I didn't  
21 mean that. I mean is there any testimony regarding what the  
22 contracting parties intended when they negotiated this term?

23 MS. MONPLAISIR: Do you mind if I stop and get the  
24 hearing transcript quickly?

25 THE COURT: Sure.

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1 (Pause.)

2 MS. MONPLAISIR: Your Honor, the only extrinsic  
3 evidence we have from this Amendment Number 4 is from the  
4 hearing on it. And the evidence that we have is, this amendment  
5 was intended to be an expansion of liabilities.

6 THE COURT: Well, certainly.

7 MS. MONPLAISIR: There was no discussion of "we intend  
8 to exclude Alabama wrongful death damages and call them  
9 punitive." There was no discussion of that. The parties did  
10 not really discuss what punitive meant. But the whole purpose  
11 of the amendment in the first place was to increase liability on  
12 FCA. Under FCA's interpretation, which would bar all wrongful  
13 death claims in the State of Alabama, that would not only  
14 restrict those liabilities, it would completely abrogate them.

15 THE COURT: Well, let me ask you a question. Could  
16 you, under the Alabama statute, prove that FCA acted willfully  
17 and wantonly and recover \$100 million in punitive damages?

18 MS. MONPLAISIR: No, Your Honor.

19 THE COURT: Why not?

20 MS. MONPLAISIR: Under the statute, wrongful death is  
21 based on negligence. There is no mention of wantonness or  
22 willfulness or anything. The statute just says it's based on an  
23 omission or wrongful act negligence.

24 THE COURT: And you're saying that the  
25 reprehensibility of the conduct leading to the injury has no

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1 effect on the damage award?

2 MS. MONPLAISIR: If we get a verdict against FCA, the  
3 Court reviews every wrongful death verdict for reasonableness.  
4 And in part of that, they look at the reprehensibility of the  
5 conduct.

6 THE COURT: Okay. So, my point is that FCA could be  
7 liable for traditional punitive damages, or what we consider  
8 traditional punitive damages under Black's Law Dictionary and  
9 what every first-year law student learns in torts. So how do  
10 you prevent that?

11 MS. MONPLAISIR: Well, Your Honor, we submit these are  
12 not traditional punitive damages. Number one, Black's Law  
13 Dictionary says that punitive damages have to have an existing  
14 compensatory damages award. And the punitives are an  
15 enhancement to compensatory damages.

16 THE COURT: Right.

17 MS. MONPLAISIR: Here, we don't have compensatory  
18 damages. These are the only recoveries.

19 THE COURT: So, why don't they fit the definition of  
20 punitive in the sale order? The exclusion?

21 MS. MONPLAISIR: Because punitive damages is not  
22 explained the sale order. We don't have a definition. So, we  
23 have to --

24 THE COURT: Yeah, but you've told me there's no  
25 extrinsic evidence. And I'll look, at Black's Law Dictionary,

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1 and I know what Black's Law Dictionary says, because I looked at  
2 it before I came here. You just told me that the state court  
3 judge could consider the reprehensibility of the conduct in  
4 fixing the award. And that just sounds like traditional  
5 punitive damages. So, my question is, how do you prevent that?  
6 Because if you tell me you can't, then it really sounds like  
7 punitive damages.

8 MS. MONPLAISIR: Well, Your Honor, we could amend our  
9 complaint and just plead for negligence. Then the jury would  
10 just be instructed on negligence and would never consider any  
11 wanton conduct.

12 THE COURT: But isn't that worse? In other words,  
13 normally, you wouldn't get punitive damages absent willful and  
14 wanton conduct. Now, you're saying, well, you can get punitive  
15 damages, uncapped punitive damages, based on mere negligence.  
16 It just sounds like that makes it worse, not better.

17 MS. MONPLAISIR: Your Honor, I think the fact that  
18 they're based on negligence makes it better because it shows  
19 that they are a completely different animal. And, Your Honor, I  
20 want to point out that Defendant cites a case called Tillis  
21 Trucking. And in that case, the Alabama Supreme Court discussed  
22 several wrongful death damages verdicts. And I just want to  
23 read what those amounts are. They range from \$500,000 to just 4  
24 million. That's it.

25 THE COURT: When was that case decided?

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1 MS. MONPLAISIR: Tillis Trucking Company v. Moses, and  
2 the citation is 748 So. 2d 874.

3 THE COURT: What year was it?

4 MS. MONPLAISIR: 1999.

5 THE COURT: Okay.

6 MS. MONPLAISIR: And in fact, in the Tillis Trucking  
7 case, the jury awarded \$7 million, and the Alabama Supreme Court  
8 said --

9 THE COURT: So, you agree to cap your award at some  
10 number? And if so, what is that number?

11 MS. MONPLAISIR: We will not agree to a cap, but we  
12 would agree to just go under negligence, and tell the jury it  
13 would just be for negligence, which when the court reviews the  
14 damages award, it would look at it and say, this is just for  
15 negligence, the reprehensibility is not high, and so they would  
16 cut the damages down.

17 THE COURT: But the criteria for awarding damages has  
18 nothing to do with compensation, right? In other words, it  
19 wouldn't look at pain and suffering or try and value pain and  
20 suffering, loss wages, loss of consortium and things like that.

21 MS. MONPLAISIR: Your Honor, that's correct. Alabama  
22 is the only state in the nation that does not allow those types.

23 THE COURT: So why doesn't Alabama legislation just  
24 pass a bill that says if punitive damages are unavailable,  
25 parties can recover compensatory damages?

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1 MS. MONPLAISIR: If they would, we would not be in  
2 this situation. The courts have been fighting over this for 150  
3 years. And they've said, these damages are a legal fiction.  
4 They're an anomaly. They're a paradox. We don't know what to  
5 do with them.

6 THE COURT: It sounds like the New York State  
7 legislature. That's exactly right, they don't know what to do  
8 with them because they're not completely punitive, and they're  
9 not completely compensatory.

10 THE COURT: It doesn't sound like they're compensatory  
11 at all.

12 MS. MONPLAISIR: Well, the --

13 THE COURT: Whether or not they're traditionally  
14 punitive is what I understand you to be arguing, but they're  
15 certainly not compensatory.

16 MS. MONPLAISIR: Well, Your Honor, the U.S. Supreme  
17 Court and the Alabama Supreme Court have both noted that while  
18 they're punitive in nature, they are compensatory in effect.  
19 And that does make sense because look at who the wrongful death  
20 damages go to. They go to the spouse and the children. They do  
21 not go to the personal representative or whoever files the case.  
22 They go to the people who would have gotten any compensatory  
23 damages.

24 THE COURT: But, you know, that's who gets punitive  
25 damages. These aren't fines or things like that.

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1 MS. MONPLAISIR: They're not fines and they're not  
2 penal.

3 THE COURT: No, but punitive damages go to the  
4 Plaintiff.

5 MS. MONPLAISIR: Well, in this case they don't. The  
6 Plaintiff in this case is --

7 THE COURT: Who gets the punitive damages?

8 MS. MONPLAISIR: The Plaintiff does not get punitive  
9 damages here. The Plaintiff is the personal representative --

10 THE COURT: Right.

11 MS. MONPLAISIR: -- bringing the case. So, any  
12 wrongful damages award would not go to the Plaintiff, but to the  
13 husband or the children. It's distributed --

14 THE COURT: Wouldn't it go to the estate?

15 MS. MONPLAISIR: It would not go to the estate.

16 THE COURT: All right.

17 MS. MONPLAISIR: Wrongful death damages do not pass to  
18 the estate, they are awarded directly under distribution  
19 statute.

20 THE COURT: Okay.

21 MS. MONPLAISIR: So, these are the same people that if  
22 Alabama allowed compensatory damages would get them.

23 THE COURT: I understand that, but how does that  
24 change the nature of the damages?

25 MS. MONPLAISIR: Because it removes the nature of the



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1 damages from focusing on punishment. There is compensatory  
2 effect here. It's not just about punishment. And we have to  
3 look at why we do this. I mean why has Alabama created this  
4 crazy law where you can't define the damages? So, the Alabama  
5 legislature has never called these damages punitive. They've  
6 always said such damages as the jury may assess.

7           The courts have said, well, we think, the policy  
8 behind this is we won't to value all human life the same. No  
9 matter how rich or poor, we want to make sure that family gets  
10 recovery based on the finality of death. And so over time, the  
11 courts have said, well, we think that means they're punitive.  
12 But they have a compensatory effect because they go to the  
13 family. So, it's just that they're hybrid. And that is why,  
14 Your Honor, we don't fit within traditional punitive damages.  
15 But it's also why applying this exclusion to Alabama is against  
16 public policy. And when other federal and state entities have  
17 looked at this issue, and they can't figure out what to call  
18 these damages, and they have an exclusion that would apply to  
19 punitives, they've said we're not going to treat Alabama's  
20 wrongful damages like punitives. And an example of that would  
21 be the IRS. They do not tax Alabama wrongful death damage award  
22 even though they tax all other punitive damages. And the reason  
23 behind that, and I believe FCA cited a case. This fifth circuit  
24 case you guys cited that talks about the reason for the Alabama  
25 exception to the IRS code is because there's a compensatory

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1 effect to the punitive damages and wrongful death.

2 Another example would be, our Alabama attorney general  
3 and Alabama courts that hold insurance companies cannot exclude  
4 punitive damages in Alabama.

5 THE COURT: Well, isn't there also a punitive effect  
6 to the damages? In other words, part of the award is to punish,  
7 right? At least that's is what the Alabama court has said on  
8 several occasions.

9 MS. MONPLAISIR: Yes, Your Honor.

10 THE COURT: So, how do you separate the compensatory  
11 element from the punitive element?

12 MS. MONPLAISIR: I think you have to look at the whole  
13 definition of punishment. So, in a traditional punitive damage  
14 setting, the punishment is intended to punish extreme conduct.  
15 But in Alabama, it's just intended to punish --

16 THE COURT: Less extreme conduct.

17 MS. MONPLAISIR: -- for finality of death. And the  
18 whole purpose of that is just to make sure the family is  
19 compensated regardless of the station of life of the decedent.  
20 So, Your Honor, we would ask that the Court deny FCA's motion to  
21 enforce; adopt our interpretation of punitive damages.

22 THE COURT: Now, I want to ask a question. It may be  
23 a question for Mr. Tsukerman. It's a bankruptcy question. The  
24 same question I asked Mr. Glueckstein. Are you aware of any  
25 cases on how cases treat wrongful death awards in Alabama under

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1 726(a)(4)? Are they subordinated?

2 MR. TSUKERMAN: Your Honor, similar to Mr.  
3 Glueckstein's answer, I haven't dug deep on that issue. I will  
4 say, I haven't discovered any bankruptcy cases that considered  
5 the specific issue of Alabama wrongful death damages in a  
6 bankruptcy case. But, Your Honor, I'm not sure that the  
7 question of how they would fall within the bankruptcy priority  
8 scheme is relevant here since we're in contract interpretation  
9 world I guess.

10 THE COURT: Okay. But if bankruptcy law treats these  
11 damages as punitive damages under 726(a)(4), maybe I should just  
12 treat them as traditional punitive damages. Because I'm not  
13 sure that the punitive damages referred to in 726(a)(4) are any  
14 different than the punitive damages referred to in the sale  
15 order. That's my point.

16 MR. TSUKERMAN: Understood.

17 THE COURT: The amendment to the sale order.

18 MR. TSUKERMAN: And, Your Honor, if you think it would  
19 be helpful, we could look into that.

20 THE COURT: You know, I'll certainly accept any letter  
21 brief you have which identifies cases on that issue. As I said,  
22 I looked quickly before I came in, and I didn't find anything.  
23 Mr. Glueckstein, I'll give you the last word.

24 MR. GLUECKSTEIN: Thank you, Your Honor. We certainly  
25 will look at that issue. I understand if there is a definitive

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1 point it might be informative. I agree that it would not be  
2 dispositive here. I do think, Your Honor, though, just to  
3 respond to a few of the points that were made by counsel. I  
4 think Your Honor hit on these issues.

5 First, with respect to the Graham issue, just one  
6 point there. The suggestion that they're going to take  
7 discovery, it might have more to say on FCA's conduct, is  
8 exactly the problem here. If the claim cannot pass through the  
9 bankruptcy gate, FCA should not be subject to defending that  
10 claim, and discovery on that claim into the conduct of Old  
11 Chrysler.

12 THE COURT: Let me ask you a question in a different  
13 way. If you can't successfully move to dismiss it, and under  
14 Alabama Law, they're entitled to discovery, why shouldn't they  
15 be entitled to discovery? Because you're really arguing that  
16 the complaint is so legally insufficient, basically, that it  
17 shouldn't pass through the gate. I'm not just not sure how you  
18 apply that in a case-by-case situation. You know, as I've said,  
19 the cases, and most recently Judge Furman, seem to say if it  
20 relies on post-sale conduct, it goes back to the trial court to  
21 determine its legal sufficiency.

22 MR. GLUECKSTEIN: I do think, Your Honor, there is  
23 still a role on this question of the standard solely based on  
24 post-sale conduct. And whether the complaint on its face  
25 alleges that's or not. And if it doesn't, perhaps a different

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1 complaint could, but I do think that the particular complaint at  
2 issue does need to be looked at by this Court. So, I'll leave  
3 it there on Graham.

4 THE COURT: Okay.

5 MR. GLUECKSTEIN: But with respect to Overton, Your  
6 Honor, a couple of points. I think Your Honor hit the nail on  
7 the head. First, the question here is, and I think I heard  
8 counsel acknowledge it. The Alabama Supreme Court have said  
9 these damages are punitive. They're trying to do what the  
10 Alabama Supreme Court has rejected many times. And they're  
11 trying to do it here in a different context now. They're trying  
12 to suggest that these really should be treated as compensatory  
13 damages under the circumstances because they have some  
14 compensatory effect. And that line of reasoning has been  
15 rejected repeatedly by the Alabama Supreme Court, and we cite to  
16 those cases in our brief.

17 And second, Your Honor, the concession that I heard  
18 is, well, we'll just limit this to a negligence theory. Which  
19 of course it was first suggested that the willful conduct  
20 wouldn't be considered, but they asserted a wantonness conduct  
21 and asserted a wrongful death claim under that cause of action.  
22 So, as the complaint current stands, they are asserting that.

23 I've now heard counsel say, well, we'll eliminate  
24 that. We'll just proceed on a negligence theory. That in no  
25 way fixes the issue. First, Your Honor, the negligence claim is

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1 still going to force FCA to defend Old Chrysler conduct.  
2 There's still a finding of fault under a negligence theory,  
3 certainly, that would need to be established to prove that cause  
4 of action.

5 THE COURT: Well, it could be the fault of Old  
6 Chrysler though.

7 MR. GLUECKSTEIN: But it could be the fault of Old  
8 Chrysler, right. And that --

9 THE COURT: If it's the fault of Old Chrysler, then  
10 under the sale order, you're not liable for punitive damages I  
11 would think.

12 MR. GLUECKSTEIN: We're not liable for punitive  
13 damages is the theory. So, I don't believe that that solves the  
14 issue that's before the Court here, because we're back in a  
15 world where there's a punitive damages claim being asserted with  
16 respect to conduct of Old Chrysler under that negligence theory.

17 Second, Your Honor, the suggestion that, well, we  
18 should just trust the system because perhaps a punitive damages  
19 order is going to be entered, and then it's going to be reviewed  
20 for reasonableness post-verdict, and we then have to go litigate  
21 the unreasonableness of some large jury verdict that  
22 unquestionably can be uncapped in the first instance is  
23 completely backwards. The issue here I the one that Your Honor  
24 raised. Why hasn't the Alabama legislature addressed this  
25 issue?

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1 THE COURT: Okay. I don't have to concern myself with  
2 that issue.

3 MR. GLUECKSTEIN: Right.

4 THE COURT: My issue is strictly whether this asserts  
5 a claim that's barred by the sale order.

6 MR. GLUECKSTEIN: Correct, Your Honor. And so, what  
7 we would submit is, what the Plaintiff is trying to do here is  
8 they don't like the effect. The effect is that the estate will  
9 not be able to pursue wrongful death damages under Alabama Law.  
10 That we submit, Your Honor, is a function of Alabama State Law,  
11 and that is not reason for this Court to deviate from the plain  
12 language of the sale order. 2.08(h) is clear. The Alabama  
13 Supreme Court is clear that these damages are punitive, and we  
14 submit that punitive damages claims are barred.

15 THE COURT: Thank you. I'll reserve decision on the  
16 enforcement motion. As I've said, I've granted the motion to  
17 reopen. You didn't mention, but Bennett, but obviously that's a  
18 separate matter, but I'll grant the motion to reopen in Bennett.

19 MR. GLUECKSTEIN: That was addressed previously, Your  
20 Honor. We've already had an order entered on Bennett.

21 THE COURT: Oh, okay. Because it was in the papers.

22 MR. GLUECKSTEIN: Yes.

23 THE COURT: And as I said, with respect to Judge  
24 Horowitz' affidavit or declaration, I'll accept it as legal  
25 argument.

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1 MR. GLUECKSTEIN: Thank you, Your Honor. And we'll  
2 submit --

3 THE COURT: And give it such weight as is appropriate.

4 MR. GLUECKSTEIN: We'll submit an order on the motion  
5 to reopen and the affidavit.

6 THE COURT: Okay. Thank you.

7 MR. GLUECKSTEIN: Thank you, Your Honor.

8 THE COURT: Thank you very much. This case is a  
9 little different from the other ones. Have a good trip home.

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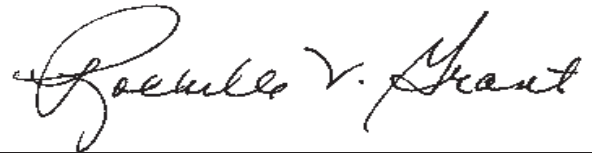
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CERTIFICATION

I, Rochelle V. Grant, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: June 11, 2018

A handwritten signature in cursive script that reads "Rochelle V. Grant". The signature is written in black ink and is positioned above a horizontal line.

Signature of Approved Transcriber